

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
RCC Minnesota, Inc.)	
RCC Atlantic, Inc.)	
)	
For Designation as an Eligible)	
Telecommunications Carrier)	
In the State of New Hampshire)	

To: Wireline Competition Bureau

REPLY COMMENTS

RCC Minnesota, Inc., and RCC Atlantic, Inc. (collectively, “Rural Cellular”), by its counsel, hereby submits its Reply Comments pursuant to the Public Notice issued by the Wireline Competition Bureau (“Bureau”) seeking comment on Rural Cellular’s petition for designation as an eligible telecommunications carrier (“ETC”) in the state of New Hampshire (“Petition”).¹ The New Hampshire Rural Carrier Group (“RCG”), TDS Telecommunications Corp. (“TDS”), Verizon, and the Cellular Telecommunications and Internet Association (“CTIA”) filed comments. As explained below, Rural Cellular satisfies the criteria for designation as an ETC throughout its requested service area, and no commenter has provided any reason compelling delay or denial of Rural Cellular’s Petition.

¹ See Public Notice, *Parties are Invited to Comment on Petitions for Eligible Telecommunications Carrier Designations, Pleading Cycle Established*, DA 04-1445 (rel. May 21, 2004)(“Public Notice”).

I. CALLS FOR DELAY HAVE NO MERIT AND MUST BE REJECTED

Both RCG and TDS wrongly suggest that ongoing proceedings to consider changes to the Commission's ETC-related rules warrant a suspension of all competitive ETC designations. RCG Comments at pp. 3-4; TDS Comments at p. 7. As a justification for suspending designations, TDS points to the fact that the Federal-State Joint Board on Universal Service ("Joint Board") has recommended permissive guidelines for states to follow in evaluating ETC petitions. However, those guidelines would merely advise states to apply essentially the same framework that the FCC applied in its *Virginia Cellular* and *Highland Cellular* orders.² Thus, for example, the possible adoption of a guideline urging states to consider whether the petitioner is willing and able to step in as the sole ETC if an ILEC withdraws (pp. 2-3) merely enunciates the standard that the FCC has consistently applied for several years.³ The FCC already applies a rigorous, fact-specific analysis to evaluate the public interest, and there is no reason to believe the analysis will change significantly as a result of the Joint Board's recommendations. Moreover, TDS's assertion that Rural Cellular may claim to be "grandfathered" under the old rules (at pp. 6-7) is completely irrelevant to Rural Cellular's qualifications under the current rules. Whether any competitive ETC can be "grandfathered" is an issue properly addressed in the ongoing rulemaking proceeding in CC Docket 96-45.

Rural Cellular could not agree more with TDS's contention that the FCC "is well-positioned to address the important issues concerning the ETC designation process in a

² *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular*"); *Highland Cellular, Inc.*, FCC 04-37 (rel. Apr. 12, 2004) ("*Highland Cellular*").

³ See, e.g., *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 56 (2000) ("*Western Wireless*"), Order on Reconsideration, 16 FCC Rcd 19144; *Guam Cellular and Paging, Inc. d/b/a Guamcell Communications*, CC Docket No. 96-45, DA 02-174 (C.C.B. rel. Jan. 25, 2002) at ¶ 17 ("*Guamcell*"); *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18139 (2001) ("*Pine Ridge*").

comprehensive rulemaking proceeding in which all interested parties have an opportunity to participate, rather than on a piecemeal basis in connection with specific petitions for ETC designation.” TDS Comments at p. 4. However, as TDS notes, the FCC has made clear its intent to continue processing competitive ETC petitions while the possibility of rule changes is being considered. *Id.* at p. 7. TDS’s assertion that conditions have “changed” since Virginia Cellular and Highland Cellular is simply false. The FCC released the *Highland Cellular* order *after* the release of the *Recommended Decision*, and the FCC first referred the issues to the Joint Board in November 2002. Numerous competitive ETC designations have been made since that time. A decision to put all ETC petitions on hold based on the possibility that the applicable rules will be changed would be “similar to a judge dismissing a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute.” *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). Clearly, there will always be the possibility that a given rule will be changed. The only lawful response is to apply existing rules and policies until those changes occur.

II. RURAL CELLULAR HAS AMPLY DEMONSTRATED ITS QUALIFICATIONS AS AN ETC

A. Rural Cellular Provides the Supported Services.

In its comments, RCG makes the spurious allegation that Rural Cellular “is not following the emergency access rules it is obligated to follow as a CMRS provider.” RCG Comments at pp. 6-7. RCG ignores a critical fact: Rural Cellular’s E-911 report dated May 3, 2004, demonstrates that Rural Cellular has deployed both Phase I and Phase II E-911 in every area of New Hampshire in which it received a request from a public safety answering point (“PSAP”).⁴

⁴ According to Appendix B to RCC’s report, RCC deployed Phase I E-911 on its TDMA and CDMA networks in New Hampshire on October 31, 2003, and December 30, 2003, respectively, and it was projected to deploy Phase II

As for the difficulties related in the report, those statements were provided in compliance with the reporting requirements set forth in the *Phase II Stay Order*, including the obligation to identify any problems impeding provision of requested service, describe steps the company has taken to resolve any problems, and provide projected deployment dates.⁵ Specifically, Rural Cellular indicated that it had concerns about the accuracy rates of its chosen network-based solution. Rural Cellular stated that it was addressing those concerns by committing to deploy an alternative network-based solution by a different provider. Furthermore, Rural stated that it would elect a handset-based solution for all of its CDMA markets.

In short, nothing in the record suggests that Rural Cellular is out of compliance with the emergency calling rules. As with many CMRS providers serving rural areas, compliance with Phase II mandates has not been easy. To the extent there are concerns that its chosen solution may not be optimal, Rural Cellular has provided a clear path to resolving those concerns. Indeed, the availability of high-cost support will speed the resolution of any existing deployment difficulties: as Rural Cellular stated in its Petition, “for every cell site that Rural Cellular constructs, the reliability and performance of Rural Cellular’s E-911 service will improve.” Petition at p. 14. Accordingly, there is no question that Rural Cellular satisfies the obligation to provide access to emergency services in accordance with 47 C.F.R. Section 54.101(a)(5).

B. Rural Cellular Has Made Clear and Verifiable Commitments to Provide Service Upon Reasonable Request and to Build Out Its Network.

RCG makes the perplexing claim that Rural Cellular’s commitment to provide service to consumers upon reasonable request is “empty and sterile”. RCG Comments at pp. 9-10.

E-911 on both its TDMA and CDMA networks on June 1, 2004.

⁵ See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, 17 FCC Rcd 14841, 14849-90 (2002) (“*Phase II Stay Order*”).

However, Rural Cellular's commitment in this regard is identical to that made by Virginia Cellular and Highland Cellular and approved by the FCC in its orders designating them as ETCs;⁶ indeed, Rural Cellular explicitly incorporated by reference all of the *Virginia Cellular* commitments, including the six-step "reasonable request" process.⁷ Identical or near-identical commitments have been approved by several state commissions as well.⁸ Accordingly, there can be no doubt that Rural Cellular's commitment to respond to consumer requests satisfies all applicable requirements.

Just last week, the Oregon Public Utility Commission designated RCC Minnesota, Inc. as an ETC in Oregon, including areas served by rural ILECs. Following full evidentiary hearing, including supplemental briefing on the effect of the FCC's Virginia Cellular and Highland Cellular decisions, the commission issued a lengthy decision covering all of the issues. Notably, the Commission accepted Rural Cellular's commitment to serve all consumers upon reasonable request, the six step commitment for provisioning service to requesting customers, and virtually every other issue in play in the instant proceeding. A copy is attached hereto for the Commission's reference.

Moreover, there is no factual basis for claims by RCG and TDS that Rural Cellular's build-out plans are somehow inadequate. Contrary to RCG's assertions, neither incumbent nor competitive ETCs are required to commit to a "firm, comprehensive build-out schedule". RCG

⁶ *Virginia Cellular, supra; Highland Cellular, supra.*

⁷ See Petition at pp. 21-22.

⁸ See, e.g., Alaska Digitel, L.L.C. Order Granting Eligible Telecommunications Carrier Status and Requiring Filings, Docket U-02-39, Order No. 10 (August 28, 2003); Smith Bagley, Inc., Case No. 03-00246-UT, Recommended Decision of the Hearing Examiner (N.M. Pub. Reg. Comm'n, June 14, 2004); RCC Minnesota, Inc., Docket No. UM-1083 (Or. PUC, June 24, 2004); Easterbrooke Cellular Corp., Case No. 02-1118-T-PC (W.V. PSC, May 29, 2003) (effective June 22, 2003).

Comments at p. 10. Rather, the requirement is that the carrier use all high-cost support “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” 47 U.S.C. Section 254(e). There is no requirement that all or a specific portion of an ETC’s support be dedicated to constructing new cell sites, because rural consumers may be equally if not better served by digital upgrades, increased channel capacity, or other service improvements. As the Vermont Public Service Board recently emphasized in its order granting ETC status to two Rural Cellular affiliates:

While the Board believes that investment in capital construction is a useful indicator of an ETC’s progress toward ubiquity of coverage, we do not believe that it is critical to demonstrating compliance with ETC certification. The Board agrees with RCC that it is also important that support be used to expand the volume of calls that the company can manage as customers access the network from their homes, cars or work places. An ETC’s investments in service quality and service overall for existing customers are as necessary to serving the public interest as investments in the geographic expansion of coverage. Therefore . . . RCC only will be required to provide evidence that it uses universal service support for the provision, maintenance, and upgrading of facilities and services for which the support was intended, in the same manner as wireline ETCs.⁹

Although Rural Cellular’s commitment is ultimately to use support only for the “provision, maintenance, and upgrading of facilities and services,” Rural Cellular has made network build-out commitments consistent with those set forth in *Virginia Cellular* to extend or improve service to consumers in rural areas.¹⁰ Specifically, Rural Cellular stated in its Petition that it will “commenc[e] construction of new facilities that would bring new and/or improved wireless services to the communities in or around the Littleton, Plymouth, Lyme and Rollinsford

⁹ RCC Atlantic, Inc. d/b/a Unicef, Docket No. 5918 (Vt. Pub. Serv. Bd., Nov. 14, 2003) at p. 48.

¹⁰ See *Virginia Cellular*, *supra*, 19 FCC Rcd at 1571.

areas in New Hampshire.” Petition at p. 12. Similar to Virginia Cellular’s plans, Rural Cellular’s plans “may evolve over time as it responds to consumer demand.”¹¹

Contrary to TDS’s assertion, *Virginia Cellular* does not require an ETC petitioner to “commit specifically to expand and improve its network to residences that are not currently served by the wireline network” or demonstrate that “the wireline service currently available is unsatisfactory”. TDS Comments at pp. 8-9. TDS cites no statute, rule or order that requires a carrier to construct network facilities to an area where no specific request for service has come from. Nor was Virginia Cellular required to demonstrate that its build-out plan would provide coverage to areas lacking wireline service. Virginia Cellular properly indicated its readiness to respond to requests from customers to the extent they may not be reached by wireline networks – a commitment that Rural Cellular has incorporated into its Petition by reference.¹² As the Commission has recognized, wireless service offers inherent advantages over wireline.¹³ Thus, a wireless ETC applicant need not make a special showing that wireline service is “inadequate”.

Finally, RCG fails to provide any support for its baseless suggestion that Rural Cellular will use high-cost support in an unlawful manner. Contrary to RCG’s claim, the USF spending requirement is not “service-area-specific.” RCG Comments at p. 10. Indeed, such a requirement would be absurd and could not possibly be competitively neutral. This is especially so when wireless facilities often provide service to a wide area. The FCC’s rules specifically

¹¹ *Id.*

¹² *Id.* at 1576 n.88.

¹³ *Id.* at 1576 (“For example, the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities. Virginia Cellular also submits that, because its local calling area is larger than those of the incumbent local exchange carriers it competes against, Virginia Cellular’s customers will be subject to fewer toll charges.”)(footnote omitted). *See also* Separate Statement of Chairman Michael K. Powell (“we recognize the unique value that mobile services provide to rural

require a competitive ETC to use all support only for the provision, upgrading and maintenance of services and facilities in the designated ETC service area. 47 C.F.R. Section 54.7. However, not all facilities need to be located within the ETC service area.¹⁴ A carrier using wireless technology may construct a cell site that encompasses multiple rural ILEC service areas. Therefore, parsing out which expenses go where would serve no useful purpose.

Furthermore, the fact that proposed facilities are located in Verizon's service territory does not at all detract from the depth of Rural Cellular's commitment to expand its network coverage. It is merely consistent with the sound network development practice of building out gradually from more to less densely populated areas. RCG would apparently prefer that this paradigm be turned on its head – yet no carrier could be expected to start in the most sparsely populated areas and work their way inward to cities and towns. Rural ILECs did not begin by providing service with a network whose reach extended throughout their current service areas; they began by constructing facilities where it was most feasible and then expanding those facilities over time – *while receiving implicit and/or explicit universal service support*. Rather than demand instant coverage to all remote areas, the Commission has recognized that competitive ETCs must be given the same opportunity to use high-cost support to build out their networks, just as ILECs have done for decades.¹⁵ Rural Cellular proposes to do just that.

consumers”).

¹⁴ See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8874-75 (1997) (“*First Report and Order*”) (“we conclude that our determination not to impose restrictions based solely on the location of facilities used to provide the supported services is competitively neutral in that it will accommodate the various technologies and entry strategies that carriers may employ as they seek to compete in high cost areas.”)

¹⁵ See *Federal State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission (“South Dakota Declaratory Ruling”)*, FCC 00-248 (Aug. 10, 2000) at ¶ 17.

C. ILEC Commenters Have Failed to Demonstrate that Harm Would Result From Rural Cellular's Designation.

The commenters do not legitimately question Rural Cellular's strong commitments that satisfy *Virginia Cellular* and demonstrate that the public interest would be served by a grant of its Petition. Similarly, no commenter has made any valid argument that consumers would be harmed by Rural Cellular's designation.

Rural Cellular's Petition demonstrates that its designation would have only a minimal impact on the size of the Universal Service Fund, *see* Petition at p. 18, and no commenter disputes this showing. Rather, the ILEC commenters' concern appears to be with the cumulative effect of designating all potential competitive ETCs throughout the country. In response to RCG's and TDS's professed concerns about the sustainability of the high-cost fund, Rural Cellular has no quarrel with the notion that, all else being equal, a smaller fund is better than a larger fund. The problem is with the suggestion by RCG and TDS that the way to control fund growth is to curtail competitive ETC designations. This position ignores the fact that rural wireline ILECs continue to receive the vast majority of high-cost universal service funds and that the size of the fund has increased significantly because the rural ILECs requested (and were granted) a higher level of funding from the FCC in 2001.¹⁶ The additional funding received by rural ILECs through the "modified embedded cost" funding mechanism far outstrips any impact on the fund caused by CETCs generally or wireless CETCs specifically.

Moreover, there is no merit to TDS's contention that continued competitive ETC designations would "force the Commission later to take more aggressive steps" to curb fund

¹⁶ *See Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-second Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 11244 (2001) ("*Fourteenth Report and Order*") ("we estimate that the modified embedded cost mechanism will result in an increase in rural carrier support of approximately \$1.26 billion over the five-year period").

growth. TDS Comments at p. 5. There are many reasons for fund growth that have nothing to do with competitive ETCs (*e.g.*, ILEC study area waivers, inefficient investments by rural wireline monopolies, the highly-publicized irregularities in the Schools and Libraries Program), and the FCC is acting on numerous fronts to control that growth – whether through changes in the USF contribution methodology or the way in which all ETCs receive support. With those ongoing proceedings, the FCC is more than adequately equipped to manage fund growth. Meanwhile, the FCC must fulfill its statutory mandate to designate qualified carriers as ETCs and promote competitive entry in accordance with the 1996 Act.

D. RCG’s Statements Regarding Advanced Services Are Unfounded, and, In Any Event, Irrelevant.

RCG complains of “apparent inaccuracies” in Rural Cellular’s Petition, and points specifically to Rural Cellular’s mention of the now-familiar notion that rural areas have long trailed urban areas in access to advanced services, which RCG appears to define as high-speed data services.¹⁷ RCG Comments at p. 4. RCG’s argument, of course, is a red herring, since high-speed data service is not a supported service and thus cannot be required of an ETC applicant. Nonetheless, RCG’s statements in this regard are worth addressing because they betray the failure of rural ILECs to provide urban consumers access to a similar array of services available to consumers in urban areas. The evidence, in fact, supports Rural Cellular’s position and only underscores the need for increased competition in rural areas.

To U.S. Cellular, it is self-evident that rural consumers continue to trail their urban counter-parts in terms of access to mobile wireless and advanced high-speed data services. Both

¹⁷ RCG fails to mention that mobile wireless is an advanced service to consumers who are relegated to wireline telephony.

the FCC and Congress have repeatedly attempted to enact programs or pass legislation to address these problems.

RCG cites self-serving reports prepared by NTCA and OPASTCO, while ignoring the FCC's findings that support Rural Cellular's position that rural America continues to suffer. For example, according to the Bureau's High-Speed Services for Internet Access study released last month, 26.5% of zip codes in areas with a population density of fewer than 6 persons per square mile do not have even one subscriber to high-speed data service,¹⁸ while the corresponding figure for areas with more than 3,147 persons per square mile is only 1.1%.¹⁹ While the gap has shrunk in recent years, it is undeniable that there has been a significant lag dating back at least to 1999, the earliest year studied in the report.

Moreover, the NTCA and OPASTCO reports RCG cites are unreliable and do not stand for what RCG claims they do. With response rates of only about a third of those polled,²⁰ the reports are heavily skewed toward those companies that had the ability and inclination to respond positively to a survey about broadband service deployment. Even with this bias, the results are not favorable for RCG's position. OPASTCO defines "advanced services" as providing access at a rate of at least 200 kilobits per second (kbps) in both directions. *See* OPASTCO Press Release at p. 1. According to the NTCA Report, only 8% of customers in the respondents' service areas subscribe to service with speeds of 200 to 500 kbps. NTCA Report at p. 3. The take rates for 1 megabit per second (Mbps) and 3 Mbps service are only 2% each. *See id.* Given

¹⁸ According to the NTCA report cited by RCG, the "population density in most member service areas is in the one to five customers per square mile range." NTCA 2003 Broadband Survey Report at p. 5 ("NTCA Report").

¹⁹ *See* "High-Speed Services for Internet Access: Status as of December 31, 2003" (I.A.D., Wireline Comp. Bur., June 2004) at Table 14. The report can be viewed on the FCC's web site at <http://www.fcc.gov/wcb/iatd/recent.html>.

²⁰ *See* NTCA Report at p. 6; OPASTCO Press Release, "New Survey Shows OPASTCO Rural Telcos Make Advanced Services Widely Available" (rel. May 10, 2004) ("OPASTCO Press Release").

these numbers, the cited reports provide no support at all for RCG's assertion that "rural independent customers receive advanced telecommunications services and innovative services at timelines that far exceed urban rates." RCG Comments at p. 5.

The likely reason for the low take rates for advanced services offered by rural ILECs is their inability to offer high-speed service at prices that are attractive to consumers. According to the NTCA Report, its survey respondents charge an average of \$44.53 per month for DSL service. Northland Telephone Company, a member of RCG, offers DSL with approximate speeds of 256 kbps upstream and 768 kbps downstream for \$42.95 per month.²¹ Meanwhile, consumers in suburban and urban areas appear to get more bang for their buck. Verizon, for example, is currently offering DSL service with approximate speeds of 320 kbps for \$29.95 per month.²²

One reason for this disparity is the absence or near-absence of competition in NTCA and RCG members' service areas. While 76% of NTCA's survey respondents indicated they face competition for high-speed services – likely an unrealistically high number, given the low response rate of the NTCA survey – 61% of those claiming to face competition said they only face competition in cities and towns. *See* NTCA Report at pp. 8-9. Given the lack of competition in more rural areas, rural ILECs are free to roll out service aggressively in those areas to lock up market share. Yet, as indicated by NTCA members' 8% take rate for relatively low-end advanced services, this is clearly not happening.²³ As the Commission has repeatedly

²¹ *See* http://www.fairpointne.com/internet/dsl_connex.php.

²² *See* <http://www22.verizon.com/forhomedsl/channels/dsl/package+price.asp>.

²³ *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report*, 17 FCC Rcd 2844, 2888 (2002) ("Despite the upward trend in subscription rates for rural communities, we note that a positive correlation persists between population density and the presence of high-speed subscribers. In addition, there continues to be a significant

emphasized, the answer is to enable carriers using wireless and other alternative technologies to succeed where wireline has failed.²⁴ As CTIA emphasizes, designation of Rural Cellular will fulfill this goal by “increasing the availability of new, competitively-priced services and technologies in New Hampshire communities.” CTIA Comments at p. 6.

Rural Cellular is ready, willing and able to take on this challenge. Its customer focus is predominantly rural and its technology choice (CDMA) will enable it to deliver high-speed data over its voice network.

disparity in access to advanced services between those living in rural population centers and those living in sparsely-populated outlying areas. As a result, we believe that it is important to closely monitor the availability of advanced services for rural Americans, especially those living outside of the rural population centers, in order to ensure that they receive timely access to advanced services.”)

²⁴ See *id.* at 2891 (“There is evidence that emerging technologies and providers will develop into viable alternatives for segments of the rural community that remain unserved.”). See also *In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Notice of Proposed Rulemaking and Order*, 16 FCC Rcd 596 (2001).

III. CONCLUSION

For the reasons stated above, Rural Cellular requests that the Commission promptly grant its Petition.

Respectfully submitted,

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July 6, 2004

CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 6th day of July, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Reply Comments* filed today to the following:

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